No. 93-644

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R & D CO., LTD. AND AMERICAN HONDA MOTOR CO., INC.,

Petitioners

v.

KARL L. OBERG,

Respondent

On Writ of Certiorari to the Supreme Court of Oregon

HONDA'S MEMORANDUM IN RESPONSE TO OBERG'S POST-ARGUMENT MOTION AND BRIEF

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HONDA'S MEMORANDUM IN RESPONSE TO OBERG'S POST-ARGUMENT MOTION AND BRIEF

1. a. Honda wholeheartedly supports Oberg's motion for leave to file a post-argument brief calling the Court's attention to the recent decision of the Oregon Court of Appeals in *Tenold* v. *Weyerhauser Co.* The holding of *Tenold* is that Oregon's statutory cap on damages — which presumably would be binding in bench trials or in diversity cases tried in federal court — is an unconstitutional expansion of the power of Oregon courts under Article VII, §3, because it "reinstitutes the practice of courts reducing excessive jury awards." SA15. The decision unambiguously confirms Honda's submission that the Oregon courts are prohibited from correcting excessive damages verdicts, and we are frankly mystified by Oberg's bizarre suggestion to the contrary.

Oberg italicizes brief snippets of the *Tenold* opinion that he tenders as support for the proposition that "Article VII, §3 permits Oregon courts to ensure, even on post-trial review, that the amount of damages awarded by the jury is supported by legally sufficient evidence." Supp. Br. 1. But when the court refers to the possibility of setting aside a verdict because "no evidence supports it" (SA18; see also SA15), it plainly has in mind only the question whether the evidence supports *any* amount of damages, not whether it supports the amount awarded by the jury. The *Tenold* court thus emphatically explained that "the amendment [of Article VII, §3] was intended to prohibit courts from deciding that a jury's factual determination of the amount of damages is improper when measured against a statutory standard, such as 'excessive,' and nullifying the verdict." SA12. Elsewhere, the court stated that "the people chose to make jurors the exclusive judges of the facts regarding the extent of a plaintiff's damages." SA15.[1]

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[1] The Oregon courts are of course free to classify the question of the allowable amount of damages as one of "fact" for purposes of interpreting Article VII, § 3. But their classification does not control the federal due process question. Cf. *Carpenter* v. *Shaw*, 280 U.S. 363, 367-368 (1930). The question whether, in light of the relevant substantive law of damages (and taking the facts in the light most favorable to the verdict), a "verdict is in excess of an amount that would be regarded by all reasonable men as the maximum recovery justified by the evidence" -- the standard of review rejected in *Van Lom* as incompatible with Article VII, § 3 (210

As we explained in our reply brief (at 5), this is the only understanding of Oregon law that is consistent with *Van Lom*, where the defendant advanced precisely the position here espoused by Oberg: that Oregon courts "'have authority to grant a new trial if there is no evidence to support the verdict in its entirety, although there may be some substantial evidence that the plaintiff was damaged to some extent less than the amount of the verdict.'" 210 P.2d at 463. The Oregon Supreme Court flatly rejected this argument as "unsound" (*id.* at 464), observing that it would effectively return the Oregon courts to use of the "time-honored standards to which the courts have customarily adhered in passing on the question of whether a new trial should be granted for excessive damages" (*ibid.*) -- something that it unequivocally deemed prohibited by Article VII, § 3.

Oberg has failed entirely to come to grips with this dispositive holding, either at oral argument or in his post-argument brief.[2] It may be added that the proof of the pudding here is in Oregon's actual experience, for no Oregon court *ever* has set aside a verdict for punitive or unliquidated damages on the grounds advanced by Oberg in the 84 years since the amendment of Article VII, §3.

P.2d at 463-464) -- is one of law that is committed to the courts in our system of justice.

[2] Oberg renews (Supp. Br. 2 n.2) his assertion that the "no evidence" language of Article VII, § 3 has been interpreted by the Oregon courts to allow "substantial evidence" review. The problematical nature of this submission is shown by the fact that the decisions both in this case (Pet. App. 27a) and in *Tenold* (SA12-SA15, SA18, SA24, SA27) adhere consistently to the "no evidence" language.

In any event, this question is a red herring as concerns the issue now before this Court, because, as *Van Lom* makes clear, once *any* amount of damages is found to be permissible, the question whether the amount chosen by the jury is excessive is not reviewed even under the "no evidence" rubric. See also *Fowler* v. *Courtemanche*, 274 P.2d at 275 (review of punitive damages limited to existence of evidence to support finding of malice; if such evidence exists, verdict must be upheld "whether deemed excessive or not").

b. Oberg also contends (Supp. Br. 3-4 & nn. 3-5) that three pre-*Van Lom* decisions cited in *Tenold* — *Malpica* v. *Cannery Supply Co.*, 187 P. 596 (Or. 1920); *Sigel* v. *Portland Ry. Light & Power Co.*, 135 P. 866 (Or. 1913); and *Buchannan* v. *Lewis A. Hicks Co.*, 134 P. 1191 (Or. 1913) — support his position that Oregon provides review of the size of damages awards. But whether or not the out-of-context quotations from those opinions offered in his brief would have provided some arguable support to Oberg in 1913 or 1920, they are of no value after *Van Lom*. That is why the *Tenold* court cited the cases for quite a different proposition: that Article VII, §3 "was intended to *prohibit* courts from deciding that a jury's factual determination of the amount of damages is improper when measured against a statutory standard, such as 'excessive,' and nullifying the verdict." SA12 (emphasis added).

Indeed, in *Malpica* itself, a jury awarded the plaintiff $12,000 in a personal injury suit. The trial court found that "there was no evidence introduced upon the trial of this cause to justify a verdict for any greater sum than $2,000." See 187 P. at 597. Although this is the very circumstance in which Oberg contends that Oregon courts may reduce jury awards, the trial court instead stated that it was "of the opinion that, notwithstanding the aforesaid findings of fact, it has no power under the law to set aside said verdict and judgment or to require plaintiff to remit that part of the verdict and judgment herein entered in excess of $2,000 and denies the defendant's motion for a new trial." *Ibid.*

The Oregon Supreme Court affirmed. Although its opinion contained some language, cited by Oberg (Supp. Br. 3 n.4), describing the extent of the plaintiff's injuries, it is evident that the court was not engaging in any form of traditional excessiveness review and that the basis for its decision was lack of power to set aside the verdict. In this connection, we urge this Court to review the passages from the early opinions that are quoted in the *Tenold* decision (SA12-SA13), which, we submit, make clear the understanding of the Oregon courts (at least after *Van Lom*) that their review is limited to instructional errors and the existence of any evidence to support *some* award of damages.

2. Oberg is equally incorrect in contending (Supp. Br. 4), in a portion of his brief that appears to have little to do with *Tenold*, that *Van Lom* contemplates the availability of *pre*-verdict review in a case such as this one.[3] In *Van Lom*, the court noted that cases like *Lyons* v. *Browning*, 133 P.2d 599 (Or. 1943) (cited at Supp. Br. 4), stand for the proposition that a court may withhold the plaintiff's full request for damages from the jury when the case involves a "liquidated claim" and it is apparent from the face of the pleadings or from the undisputed evidence that the damages request is insupportable. 210 P.2d at 467. The court explained that in *Lyons* (where damages were awarded for the destruction of six turkeys when only four actually were destroyed) there are "separate and clearly distinguishable items of the claim to which separate and distinguishable items of evidence apply." *Id.* at 468. But the court also went on to hold that "[w]e think that no discussion is necessary to show that none of these cases tend in any way to support the proposition that either this court or the Circuit Court is authorized to declare that in a case like this" — where the plaintiff sought punitive and unliquidated compensatory damages — "the evidence does not support the verdict 'in its entirety' simply because the court thinks that the verdict is too large." *Id.* at 467. The court accordingly rejected the contention that "a verdict for unliquidated damages for a single wrong * * * can be split up by the court, as it were, into separate verdicts, one of them said to be supported by the evidence and the other to have no such support." *Id.* at 468.

Thus, while *Van Lom*'s discussion of *Lyons* may be taken to recognize a right of review of the giving or refusal of an instruction limiting the damages when the plaintiff's entitlement is to a specific, identifiable amount, nothing in *Van Lom* or *Tenold* remotely supports the radically different proposition that a defendant routinely is entitled under Oregon procedure to a pre-verdict determination of the maximum allowable amount of unliquidated or punitive damages. Again, the clearest evidence on this point is Oregon practice: there has been *no* decision in the years after *Van*

[3] The damages cap statute at issue in *Tenold* expressly precludes informing the jury of the cap (see ORS § 18.560(4)), so the option of handling the matter by jury instructions would seem to be unavailable in that context.

Lom (or, so far as we are aware, since the amendment of Article VII, §3), in which a court has confined the jury's consideration of a claim for unliquidated or punitive damages under the practice invented by Oberg.[4]

3. Finally, Oberg's contention (Supp. Br. 5) that Oregon should be deemed to have *no* law of excessiveness if jury awards are not subject to review (an argument that he did not make in his principal brief to this Court) is frivolous.[5] The jury in this case, after all, was instructed as to the factors that governed the exercise of its discretion in setting damages — factors that, in the words of the Oregon Supreme Court, "establish[] the substantive criteria to be considered by Oregon factfinders * * * in setting the amounts of [punitive] awards." Pet. App. 21a. Indeed, that court upheld the constitutionality of Oregon's system on the premise that those criteria were so detailed that they amounted to "definite and meaningful constraints * * * on the finder of fact." *Id.* at 25a. Oberg defended Oregon's system on the same theory. See Resp. Br. 19.

Where compensatory damages for pain and suffering are involved, for example, Oregon's substantive damages law is that damages should be in such amount as will reasonably compensate the plaintiff (see, *e.g.*, *Brizendine* v. *Visador Co.*, 305 F. Supp. 157, 163 (D. Or. 1969) (applying this standard in diversity case); that the court lacks power to correct a particular jury's verdict that

[4] It is no wonder that the Oregon courts have not adopted Oberg's burdensome and unworkable procedure. Apart from its utter impracticality, the procedure would defeat the purpose of the voters in adopting Article VII, § 3 to minimize retrials. If a defendant is entitled to have a court consider at the close of the evidence whether the amount demanded in the plaintiff's complaint exceeds the maximum amount permissible under the evidence, the court's decision whether, and if so to what extent, to grant that relief will be reviewable as instructional error on appeal at the behest of either party, leading to frequent retrials.

[5] Since Article VII, § 3 is concerned with factual determinations generally, and is not specifically directed at damages awards, it can hardly be the case that the provision was intended to displace Oregon's substantive law of damages.

is unreasonably high in relation to that objective hardly means that the award is not legally excessive. The same is true of punitive damages that are larger than necessary to serve the purposes justifying such penalties under Oregon law. An Oregon judge conducting a bench trial, after all, would have law to apply in setting a non-excessive punitive award, as would a federal judge reviewing a jury's verdict in a diversity case (see, *e.g.*, *Dias* v. *Sky Chefs, Inc.*, 919 F.2d 1370, 1376 (9th Cir. 1990) (reviewing punitive damages under substantive standards used by Oregon courts in FELA cases); that same law governs the jury's deliberations, although Article VII, § 3 has made the jury's error (unlike the judge's) not subject to judicial correction. Can Oberg really be arguing that a verdict of $5 *billion* in this case would not have been excessive under Oregon law just because there is no mechanism to set it aside?

Oberg's related contention (Supp. Br. 5) that because state law determines whether a property interest exists in the first place, a state's procedures for enforcing the right determine its substantive scope is nothing less than an effort to resuscitate the discredited "bitter with the sweet" theory of due process. See, *e.g.*, *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 541 (1985). The cases cited by Oberg stand only for the proposition that "[i]f the decisionmaker is not 'required to base its decisions on objective and detailed criteria,' but instead 'can deny the requested relief for any constitutionally permissible reason or for no reason at all,' * * * the State has not created a constitutionally protected * * * interest." *Olim* v. *Wakinekona*, 461 U.S. 238, 249 (1983), quoting *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S 458, 466-467 (1981). But here, of course, Oregon statutory law requires — as the court below held and as Oberg himself recognizes — that the jury base its decision on specific criteria. Due process mandates that Oregon provide a minimally fair method for determining that those criteria have been applied properly.[6]

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[6] We do not, of course, assert that Honda has a procedural due process right to a *correct* determination as to whether the award comports with the state substantive standards. We argue only that the state must make use of a procedural regime that appropriately minimizes the risk of error. Cf. *TXO*, 113 S. Ct. at 2727 (Scalia, J., concurring).

In sum, we strongly urge this Court to grant Oberg's motion and to read the *Tenold* decision carefully. That decision convincingly repudiates the distorted version of Oregon law that Oberg has propounded in his briefs and oral argument in an effort to persuade the Court not to reach the issue on which it granted review.

Respectfully submitted.

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